



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

OCT 18 2012

OFFICE OF
GENERAL COUNSEL

Mark Levin
Landmark Legal Foundation
19415 Deerfield Ave, Suite 312
Leesburg, VA 20176

Re: Freedom of Information Act Appeal HQ-APP-00186-12 (HQ-FOI-01861-12)

Dear Mr. Levin:

I am responding to your September 14, 2012 appeal of a denial of expedited processing under the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552 ("Appeal Letter"). You appealed the August 29, 2012 letter from Larry F. Gottesman, National FOIA Officer of the U.S. Environmental Protection Agency (the "EPA" or "Agency") to deny your request for expedited processing of your FOIA request numbered HQ-APP-01861-12 ("Denial Letter"). Your request for a fee waiver for this FOIA request was granted, and you are not appealing the decision regarding your request for a fee waiver at this time.

You seek expedited processing of your FOIA request for documents and records regarding communications about proposed rules and regulations that have not been finalized between January 1, 2012 and August 17, 2012, specifically, "information relating to any EPA rule or regulation for which public notice has not been made, but which is contemplated or under consideration for public notice between January 1, 2012 and August 17, 2012." Your request was subsequently modified by limiting the search to senior officials in EPA HQ. Your request was made on behalf of the Landmark Legal Foundation, which you describe as a "tax-exempt, public interest law firm." FOIA Request Letter from Landmark Legal Foundation, August 17, 2012 ("Request Letter") at 7.¹ Your request for expedited processing was denied because "[y]ou have not demonstrated that the lack of expedited treatment could reasonably be expected to pose an imminent threat to the life or physical safety of an individual." Denial Letter, August 29, 2012.

I have carefully considered your initial request for expedited processing, the EPA's initial denial of your request, and your appeal. For the purposes of this appeal, I am not addressing the

¹ For purposes of this appeal, "you" and "your" refers to communications between the EPA and any representative of Landmark Legal Foundation regarding this FOIA request.

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question of whether your request, as written, reasonably describes the records that you are requesting in order to constitute a proper FOIA request. For the reasons set forth below, I have concluded that your appeal requesting expedited processing should be, and is denied.

Analysis

In your appeal letter, you state that your request qualifies for expedited processing under 40 C.F.R. § 2.104(e)(i)-(ii), which provides for the EPA to take requests out of order and provide expedited processing when the EPA determines that such requests or appeals involve a “compelling need,” as follows:

- (i) Circumstances in which the lack of expedited treatment could reasonably be expected to pose an imminent threat to the life or physical safety of an individual; or
- (ii) An urgency to inform the public about an actual or alleged Federal government activity, if the information is requested by a person primarily engaged in disseminating information to the public.

In your appeal letter, you have not contended that the documents you request are required due to an imminent threat to the life or safety of an individual. Therefore, I will analyze your request for expedited processing under section (ii) of the EPA’s regulations only.

“Person Primarily Engaged in Disseminating Information to the Public”

To qualify for expedited processing under 40 C.F.R. §2.104(e)(ii), a requester must establish that they are a person primarily engaged in disseminating information to the public. As EPA’s regulations state at 40 C.F.R. §2.104(e)(ii)(3), in order to receive expedited processing under this provision, the requester must submit a statement certified to be true and correct to the best of your knowledge and belief, explaining in detail the basis for the request. *Id.* If you are not a full-time member of the news media, you must establish in that statement that you are a person whose primary professional activity or occupation is information dissemination, although it need not be your sole occupation. *Id.*

In your FOIA Request Letter, incorporated by reference in your Appeal, you state that your organization has a primary mission as a tax-exempt, public interest law firm, who investigates, litigates, and publicizes instances of improper and/or illegal government activity. Request Letter at 7. In your appeal, you noted that Landmark reviews and provides comments to EPA on proposed regulations and assist with challenges to EPA actions. You have not established that the Landmark Legal Foundation is primarily engaged in disseminating information to the public. You also claim that Landmark Legal Foundation “is discussed” by various third party media outlets and that Landmark has published articles in print media and

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appeared on TV. However, you did not provide any evidence or examples. Research and advocacy that is covered by third party media, your group's public appearances, and information presentations do not demonstrate that Landmark Legal Foundation itself is primarily engaged in dissemination of information to the public.

For the reasons explained, I find that you have not established that you are a person primarily engaged in disseminating information to the public to meet the threshold requirement of 40 C.F.R. §2.104(e)(ii), and your appeal for expedited processing is denied on this basis.

Your request also does not meet the second element of the test for expedited processing because you have not demonstrated an urgency to inform the public about the government activity involved in the request beyond the public's right to know about government activity generally. 40 C.F.R. § 2.104(e)(ii)(3). Your request is not focused on any specific EPA activity or rule. Instead, your request asks the EPA to provide you broadly identified records based on your stated belief that proposed rules are being delayed for political reasons. The few news articles that you attached as Exhibits to your request and appeal indicate slight evidence of media interest in the general topic of politics and rulemaking. However, these articles and opinion pieces do not demonstrate substantial interest, either on the part of the American public or the media, in any particular issue which would be addressed by information responsive to your broad request. *See Am. Civil Liberties Union v. Dep't of Justice*, 2005 WL 588354, *12-14 (N.D. Cal. March 11, 2005) (citing *Al-Fayed v. Central Intelligence Agency*, 254 F.3d 300, 311 (D.C.Cir. 2001)). You have therefore not demonstrated an urgency to inform the public.

Conclusion

This letter constitutes EPA's final determination on your appeal. In accordance with 5 U.S.C. § 552(a)(4)(B), you have the right to seek judicial review of this determination by instituting an action in the district court of the United States in the district in which you reside, or have your principal place of business, or in which the Agency records are situated, or in the District of Columbia.

As part of the 2007 FOIA amendments, the Office of Government Information Services (OGIS) within the National Archives and Records Administration was created to offer mediation services to resolve disputes between FOIA requesters and Federal agencies as a non-exclusive alternative to litigation. You may contact OGIS in any of the following ways: by mail, Office of Government Information Services, National Archives and Records Administration, Room 2510, 8610 Adelphi Road, College Park, MD, 20740-6001; e-mail, ogis@nara.gov; telephone, 301-837-1996 or 1-877-684-6448; and facsimile, 301-837-0348.

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Please call Jennifer Hammitt at (202) 564-5097 if you have further questions regarding this matter.

Sincerely,

A handwritten signature in dark ink, appearing to read 'K Miller', written in a cursive style.

Kevin M. Miller
Assistant General Counsel
General Law Office

cc: HQ FOI Office,

Larry F. Gottesman, National FOIA Officer